

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
May 6, 2009 Session

**LYNN MICHELLE NIEMAN v. GREGORY DALE NIEMAN**

**Appeal from the Chancery Court for Franklin County**  
**No. 18587     Jeffrey F. Stewart, Chancellor**

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**No. M2008-02654-COA-R3-CV - Filed August 27, 2009**

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In this divorce action, the trial court accepted Husband's and Wife's stipulated grounds for divorce, as well as their agreement regarding the distribution of marital assets and debt, Husband's child support obligation, and a parenting plan; a trial was held on the sole issue of alimony. After a hearing, the trial court awarded Wife \$800 per month in rehabilitative alimony for six years. On appeal, Husband alleges that the trial court erred in awarding alimony in excess of his ability to pay and for a longer period of time than was requested; in ordering him to supplement his income to pay the alimony award; in rendering an order for him to pay a monthly "lump sum obligation," which combined his alimony and child support payments; and in declining to consider his motion to modify support because the court found that it lacked jurisdiction. Finding that the trial court erred in finding that it lacked jurisdiction to hear Husband's motion to modify child and spousal support, we reverse and remand for further hearing. In all other respects we affirm the judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court**  
**Affirmed in Part and Remanded**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M.S. and FRANK G. CLEMENT JR., J. joined.

Jonathan R. Bunn, Tullahoma, Tennessee, for the appellant, Gregory Dale Nieman.

Joseph E. Ford, Winchester, Tennessee, for the appellee, Lynn Michelle Nieman.

**OPINION**

**I. Factual and Procedural History**

Lynn Michelle Nieman ("Wife") and Gregory Dale Nieman ("Husband") were married on May 20, 1995; they had three children, ages 11, 8, and 3, at the time of trial. At the beginning of the marriage, Husband worked at Cubic Transportation and Wife worked at Fujicolor, but in June 2005, the parties agreed that Wife would quit her job to care for the children.

In May 2007, Cubic Transportation offered, and Husband accepted, a temporary position located in Australia. In July 2007, Husband was offered an extended position to remain in Australia as an employee of Cubic Australia and, after a discussion, the parties agreed that Husband should accept the position. Because of his new employment with Cubic Australia, Husband lost all benefits offered by Cubic Transportation, including health insurance for the children.

While in Australia, Husband had an extra-marital affair. Wife filed a complaint for divorce on December 14, 2007, alleging that Husband was guilty of adultery and that she was entitled to an absolute divorce. Husband filed an answer and counter-complaint on January 7, 2008, admitting the extra-marital affair and seeking a divorce for inappropriate marital conduct and irreconcilable differences.

At the divorce hearing on August 15, 2008, the parties informed the court that they reached agreements prior to trial regarding the distribution of marital property and debt, a parenting plan, and child support; the parties also stipulated that the ground for divorce would be Husband's adultery. The parenting plan named Wife primary residential parent and was to be implemented upon Husband's return from Australia. Husband's child support obligation was set at \$1,635 per month (in accordance with the child support schedule), unless the trial court found that Wife should return to work or that income should be imputed to her.

The trial court adopted the parties' agreements and stipulated grounds for divorce; the only issue to be resolved was an award of alimony. After a hearing, the court awarded Wife \$800 per month in rehabilitative alimony for 6 years. On August 26, 2008, Wife filed a Motion to Clarify Ruling, seeking clarification on whether Husband was to pay for health insurance for the children. On September 15, Husband filed a response to Wife's motion and a Motion to Reconsider the Ruling or for a New Trial, asking the court to reconsider its award of alimony and child support. The trial court addressed both motions by order entered on September 30, finding that, of the \$2,435 per month combined award for child support and alimony, \$300.00 "is to go toward insurance on the children and the remainder to be divided between child support and alimony." The trial court overruled Husband's motion.

On October 30, 2008, Husband filed a Motion for Decrease in Child and Spousal Support Upon a Material Change in Circumstances. The Final Decree of Divorce was entered on November 7. Husband filed a Notice of Appeal on December 1. The hearing on Husband's Motion for Decrease in Child and Spousal Support was heard on December 19, and the trial court denied the motion in an order entered on December 23, holding that "the Court would not have jurisdiction to modify an Order that is currently on appeal."

## **II. Statement of the Issues**

On appeal, Husband raises the following issues:

1. Where the parties announce a settlement regarding equitable distribution of marital property and marital debt, and where the trial court approves the settlement, but where the trial court does not deem Husband's income sufficient to pay alimony to Wife, is there error where the trial court inquires regarding requiring Husband to obtain a second job and, where a second job is unavailable, to require Husband to sell his portion of the equitable distribution to pay rehabilitative alimony to Wife?
2. Did the trial court err in awarding rehabilitative alimony in an amount more than Husband was able to pay and for a duration two years longer than would be required for Wife to obtain her stated intention of becoming a registered nurse?
3. Did the trial court err in ordering alimony and child support as a lump sum obligation?
4. Does the trial court have jurisdiction to modify its decree for child support and rehabilitative alimony based upon a material change in circumstances during a period of time its final decree regarding these matters is on appeal?

### **III. Standard of Review**

Review of the trial court's findings of fact is *de novo* upon the record accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(b); *Kaplan v. Bugalla*, 199 S.W.3d 632, 635 (Tenn. 2006). Review of the trial court's conclusions of law is *de novo* with no presumption of correctness afforded to the trial court's decision. *See Kaplan*, 199 S.W.3d at 635.

### **IV. Analysis**

#### *A. Award of Alimony*

Husband asserts that the trial court erred in awarding Wife rehabilitative alimony in excess of his ability to pay and for a period of time longer than was requested. Husband also contends that the trial court erred in requiring him to either obtain additional employment or sell his portion of the marital assets to meet his alimony obligation, which he asserts was an acknowledgment by the trial court of his inability to pay the award.

The amount and type of alimony to be awarded is within the sound discretion of the trial court in light of the particular circumstances of each case. *Riggs v. Riggs*, 250 S.W.3d 453, 456-57 (Tenn. Ct. App. 2007) (citing *Lindsey v. Lindsey*, 976 S.W.2d 175, 180 (Tenn. Ct. App. 1997)). The appellate courts will not alter such awards absent an abuse of discretion. *Id.* Moreover, the appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn. Ct. App. 1994).

In determining the propriety, nature, amount and length of an alimony award, courts are to consider the statutory factors enumerated in Tenn. Code Ann. § 36-5-121(i):

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i).

While a trial court should consider all the relevant factors under the circumstances, the two most important factors to be considered are the need of the economically disadvantaged spouse and the obligor spouse's ability to pay. *Riggs*, 250 S.W.3d at 457 (citing *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn. 2002)); *Bogan v. Bogan*, 60 S.W.3d 721, 730 (Tenn. 2001); *Oakes v. Oakes*, 235 S.W.3d 152, 160 (Tenn. Ct. App. 2007). When considering these two factors, the primary consideration is the disadvantaged spouse's need. *Riggs*, 250 S.W.3d at 457 (citing *Aaron v. Aaron*, 909 S.W.2d 408, 410 (Tenn. 1995); *Watters v. Watters*, 22 S.W.3d 817, 821 (Tenn. Ct. App. 1999)). "Moreover, the fault of a spouse in precipitating a divorce is also a consideration when determining an alimony award." *Young v. Young*, 971 S.W.2d 386, 391 (Tenn. Ct. App. 1997) (citing *Aaron*, 909 S.W.2d at 410-11). "A wife whose marriage has been shattered by her husband's misconduct should not be left in a financial situation inferior to her economic situation prior to the parties' divorce." *Id.*

In awarding the rehabilitative alimony, the trial court stated:

I would say to [Husband] that he should just get another job and supplement some of the things that he needs to pay, but because he's in a foreign land, I'm not sure whether he can, at least under the testimony or statement that he's made. But I am going to place a burden on him to help out in the form of rehabilitative alimony. You may have to dispose of an asset or some assets to do it.

But I'm going to impose over and above his obligation for child support...a responsibility of \$800 over and above his child support to help pay the expenses.

...I'm going to say that's in the form of rehabilitative alimony. And I'm going to place that responsibility on him for a period of six years, not a period of four years. And hopefully that will help to some degree. If I could do more, I would, but I think, under the circumstances, that's about all we can do for now. If that changes, certainly it can be re-examined and can be modified.

As the trial court did not make any findings of fact regarding the relevant statutory factors, we must conduct our own independent review of the record to determine where the preponderance of the evidence lies. *Broadbent v. Broadbent*, 211 S.W.3d 216, 221 (Tenn. 2006); *See Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000) (independent review required where trial court stated that it considered the entire record prior to its ruling, but did not make findings of fact with regard to the factors considered). We have carefully examined the record in light of the factors set forth in Tenn. Code Ann. § 36-5-121(i) and conclude that the evidence preponderates in favor of the amount and length of rehabilitative alimony awarded to Wife.

At trial, Wife testified that she graduated from high school and completed a year and a half of college before going to work at Fujicolor where she earned around \$26,000 per year and that, after she stopped working to care for the children, she had not sought nor obtained any other employment, but was going to school part-time to complete prerequisites for entrance into a nursing program. Wife stated that Husband was voluntarily paying about \$2,000 per month (\$1,000 bi-weekly) during the pendency of this divorce proceeding, but that this was not enough to cover her monthly expenses and that she had to borrow money from relatives and to accept a donation from her church. Wife also stated that she received half of a \$6,000 tax return and that her father gave her \$10,000 to help pay for her schooling. She further testified that her monthly expenses were around \$3,200 and that, if she went back to work after the divorce instead of going to school, she would have to pay an additional \$1,000 per month in child care. Wife requested rehabilitative alimony of four years at \$1,500 per month.

Husband testified that he completed two years of college and obtained an Associate's Degree in Electronics. After school, he worked as an electronic technician with Cubic Transportation, where he was earning \$52,000 per year, and then as a product support manager with Cubic Australia,

earning a gross income of around \$6,200 per month<sup>1</sup> and a net income of \$4,067.87 per month. Husband testified that he was paying Wife \$2,166.67 per month during the pendency of the divorce and that his monthly expenses included rent, food, automobile use and insurance, and flights to and from Australia. Husband agreed that Wife's monthly expenses were around \$3,200.

While a trial court is to factor in a spouse's ability to pay when making an award of alimony, the primary consideration is the disadvantaged spouse's need. *Riggs*, 250 S.W.3d at 457. Wife testified, and Husband acknowledged, that her monthly expenses were \$3,200 per month and that, during the pendency of this divorce proceeding, she was receiving \$2,100 per month from Husband. Wife has a limited educational background and expressed a desire to return to school to obtain a nursing degree to support herself, which would be partially funded by her father's gift. In response, Husband has failed to offer evidence sufficient to prove his inability to pay the alimony award, other than the assertion, discussed below, that the trial court's order for him to supplement his income was based on the court's belief that he was unable to pay the award. In fact, Husband's acknowledgment that Wife's monthly expenses were around \$3,200 is evidence in support of her need. Husband was paying Wife \$2,100 per month prior to the divorce hearing and, combined with child support, Husband's monthly obligation to Wife will be increased by \$335 to \$2,435. While we are mindful of Husband's testimony regarding the monthly expenses he incurred, appellate courts are disinclined to second-guess a trial court's decision regarding spousal support unless it is not supported by the evidence or is contrary to public policy. *Brown*, 913 S.W.2d at 169. In the absence of any obvious hardship imposed upon Husband by the alimony award itself or of any evidence of Husband's inability to pay, we find that the trial court's award was supported by the evidence and that the trial court did not abuse its discretion in awarding Wife \$800 per month in rehabilitative alimony.

Husband alleges that the trial court required him to supplement his income in order to meet his alimony obligation and relies on that requirement as proof that the trial court found that he was unable to pay the award. At trial, the court did consider the possibility of Husband obtaining additional employment and the value of his marital assets in making its award of rehabilitative alimony to Wife, which it was entitled to do pursuant to Tenn. Code Ann. § 36-5-121(i).<sup>2</sup> However, it is a well-known principle that a trial court speaks through its orders, *Palmer v. Palmer*, 562 S.W.2d 833, 837 (Tenn. Ct. App. 1997), and at no point in the Final Decree of Divorce was Husband

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<sup>1</sup> A pay stub, which was entered as an exhibit at trial, revealed that Husband's gross salary at Cubic Australia was about \$7,166.57 per month in Australian dollars and, at the time of trial, Husband testified that the conversion rate was .865198 Australian dollars to the U.S. dollar. Converted to U.S. dollars, Husband's salary was around \$6,200 per month.

<sup>2</sup> When making an award of alimony, a trial court can consider:

(1) The *relative earning capacity*, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;

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(8) The provisions made with regard to the marital property. . .

Tenn. Code Ann. § 36-5-121(i) (emphasis added).

required to supplement his income. Furthermore, assuming, *arguendo*, that we were to take into account the statements made at trial, while making the award of alimony, the trial court stated that “[i]f I could do more, I would, but I think, under the circumstances, that’s about all we can do for now.” As such, we do not find that the trial court imposed a requirement on Husband to supplement his income or that the trial court believed that its award of alimony was in excess of Husband’s ability to pay.

Husband also argues that the trial court’s award of six years of rehabilitative alimony was error solely because the length of alimony awarded was longer than Wife requested. “The purpose of rehabilitative support is to enable the disadvantaged spouse to acquire additional job skills, education, or training that will enable him or her to be more self-sufficient.” *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998). Our review of an alimony award is to determine whether the trial court abused its discretion in making an award that is not supported by the evidence. *Brown*, 913 S.W.2d at 169. Wife’s request for four years of support was based upon the time she anticipated graduating from the nursing program and upon the expectation of receiving \$1,500 per month in alimony. Thus, it was reasonable for the court to award Wife alimony for a period of time longer than she requested when the amount of alimony awarded to her was almost half of her desired amount and since Wife may need additional time to reenter the workforce and obtain self-sufficiency. We do not find that the trial court abused its discretion in awarding Wife rehabilitative alimony for six years.

*B. Lump Sum Monthly Child Support and Alimony Payment*

Husband asserts that the trial court erred in ordering him to pay child support and alimony as a monthly “lump sum obligation” but, in support of this argument, his brief on appeal raises a separate issue which contends that the Final Decree of Divorce did not comply with the Child Support Guidelines (“Guidelines”) because a Child Support Worksheet (“Worksheet”) was not attached to the order.

Tenn. Comp. R. & Regs. 1240-2-4-.08 provides that “[t]he Child Support Worksheet and Credit Worksheet provided by the Department [of Human Services] are mandatory for use in calculating the appropriate child support obligation under these Guidelines” and that “[t]he completed Worksheet(s) must be maintained as part of the official record either by filing them as exhibits in the tribunal’s file or as attachments to the order.” Tenn. Comp. R. & Regs. 1240-2-4-.08(1)(a); *Moore v. Moore*, 2009 WL 362295, at \*7 (Tenn. Ct. App. 2009) (vacating a trial court’s calculation of child support because “the worksheets are required and because there is nothing in the record suggesting that accurate worksheets were utilized.”) “When parties stipulate to the amount of child support to be paid...the stipulations must be reviewed by the trial court for approval.” *Jones v. Crum*, 2007 WL 1574282, at \*4 (Tenn. Ct. App. 2007) (citing Tenn. Comp. R. & Regs. 1240-2-4-.01(2)(b)(1)(i)). “[T]he tribunal shall use the Guidelines in reviewing the adequacy of child support obligations negotiated by the parties...and, if the negotiated agreement does not comply with the Guidelines or contain the findings of fact necessary to support a deviation, the tribunal shall reject the agreement.” Tenn. Comp. R. & Regs. 1240-2-4-.01(2)(b)(1)(ii).

As stated in Tenn. Comp. R. & Regs. 1240-2-4-.08(1)(a), a trial court is to use the Worksheet “in *calculating* the appropriate child support obligation.” (Emphasis added). Here, the trial court did not calculate Husband’s child support obligation, but was required to review the parties’ stipulated obligation by weighing the adequacy of the agreed amount against the Guidelines. *Jones*, 2007 WL 1574282, at \*4; Tenn. Comp. R. & Regs. 1240-2-4-.01(2)(b)(1)(i)-(ii). At trial, Husband’s counsel acknowledged that the stipulated alimony obligation of “1,635 [sic] is based on the brand new Child Support Guidelines.” Thus, the child support obligation stipulated to by the parties complied with the Guidelines and, since the trial court did not “calculate” the obligation, the court did not err in not attaching a Worksheet to the Final Decree of Divorce.

Even though Husband did not brief the issue, we choose to address the “lump sum obligation” argument. Assuming, *arguendo*, that the trial court’s statements did suggest that a “lump sum obligation” was being ordered, we do not find there to have been error. At trial, Husband’s attorney asked the court how to apply the income Husband earned in a foreign land to the United States’ child support formulas, and the trial court responded as follows:

Well, let me try to clarify it. Let me just say I’m making an award of child support and alimony in [sic] \$2,435 a month. You all can work on the figures as to how to apportion that on child support and how to apportion that on alimony - - And that the alimony would be for a period of six years.

However, in the Final Decree of Divorce, Husband’s child support payment of \$1,635 per month and alimony obligation of \$800 per month were listed separately. As stated earlier, a trial court speaks through its orders, *Palmer*, 562 S.W.2d at 837; thus, according to the language of the Final Decree of Divorce, we do not find that a “lump sum obligation” was ordered.

### *C. Motion for Decrease in Child and Spousal Support*

Lastly, Husband asserts that the trial court erred in denying his Motion for Decrease in Child and Spousal Support Upon a Material Change in Circumstances on the basis that the trial court lacked jurisdiction to modify a final order that was pending on appeal. In the motion, Husband contended that there was a “substantial and material variance in the defendant’s income such that he requests modification of his child and spousal support obligations” and requested that the trial court “grant a reduction in child support based upon the child support guidelines and a reduction in rehabilitative alimony.”

To support his argument that the trial court had jurisdiction while the Final Decree of Divorce was pending on appeal, Husband relies on Tenn. R. Civ. P. 62.03, titled “Relief Pending Appeal,” which states that:

When an appeal is taken from an interlocutory or final judgment in actions specified in Rule 62.01 or in action for alimony or child support, the court in its discretion may suspend relief or grant whatever additional or modified relief is deemed appropriate



during the pendency of the appeal and upon such terms as to bond or otherwise as it deems proper to secure the other party.

Tenn. R. Civ. P. 62.03 (emphasis added); *Young*, 971 S.W.2d at 393 (holding that “[t]he express language of [Tenn. R. Civ. P. 62.03] gives the trial court the discretion to suspend or grant whatever relief is deemed appropriate during the pendency of an appeal in an action for alimony or child support”).

In his motion, Husband sought a permanent change in child and spousal support pursuant to Tenn. Code Ann. § 36-5-101(g)(1)<sup>3</sup> and Tenn. Code Ann. § 36-5-121(a),<sup>4</sup> rather than a temporary change effective only during the pendency of this appeal. Thus, Tenn. R. Civ. P. 62.03 is not applicable to the present matter. “[O]nce a party perfects an appeal<sup>5</sup> from a trial court’s final judgment, the trial court effectively loses its authority to act in the case without leave of the appellate court.” *First Am. Trust. Co. v. Franklin-Murray Dev. Co., L.P.*, 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001) (footnote in original).

We are of opinion, however, that the trial court had jurisdiction to consider the motion, since Husband specifically sought relief under Tenn. Code Ann. §§ 36-5-101(g)(1) and 36-5-121(a), based on the difference in the currency conversion rate between the date of trial and the date of the motion. Thus, Husband was not seeking to modify the order that was on appeal<sup>6</sup> based on circumstances

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<sup>3</sup> Tenn. Code Ann. § 36-5-101 states that:

Upon application of either party, the court shall decree an increase or decrease in support when there is found to be a significant variance, as defined in the child support guidelines established by subsection (e), between the guidelines and the amount of support currently ordered, unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances that caused the deviation have not changed.

Tenn. Code Ann. § 36-5-101(g)(1).

<sup>4</sup> Tenn. Code Ann. § 36-5-121 states, in part pertinent, that:

...the order or decree [of alimony] shall remain in the court’s jurisdiction and control, and, upon application of either party, the court may award an increase or decrease or other modification of the award based upon a showing of a substantial and material change in circumstances.

Tenn. Code Ann. § 36-5-121(a).

<sup>5</sup> Perfecting an appeal consists of filing a timely notice of appeal and either an appeal bond or affidavit of indigency. *Blue Cross-Blue Shield of Tenn. v. Eddins*, 516 S.W.2d 76, 77 (Tenn. 1974) (holding that an appeal is perfected when the appeal bond is filed).

<sup>6</sup> Trial of this case was held on August 15, 2008 and the court issued its ruling from the bench. Husband filed a motion to reconsider or, alternatively, for a new trial, on September 15, which was denied by order entered September 30. Husband’s motion specifically seeking modification was filed on October 30, even though the final decree had not  
(continued...)

existing at the time of trial but, rather, sought to have the court set child and spousal support based on what was alleged to be a significance variance between the amount of child support he had been ordered to pay and the applicable guidelines and, with respect to spousal support, a material change in circumstance. As noted by the court in *Hannahan v. Hannahan*, 247 S.W.3d 625 (Tenn. Ct. App. 2007):

"After a divorce decree becomes final, a marital dissolution agreement becomes merged into the decree as to matters of child support and alimony, and the trial court has continuing statutory power to modify the decree as to those matters when justified by changed circumstances."

247 S.W.3d 625, 627.<sup>7</sup>

We therefore remand the case to the trial court for a hearing on Husband's motion filed October 30, 2008. We express no opinion as to the merits of Husband's motion or the appropriateness of any relief.

## **V. Conclusion**

For the reasons set forth above, the decision of the Chancery Court is AFFIRMED in part and the case remanded for further proceedings in accordance with this Opinion.

Costs are assessed equally against Husband and Wife, for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE

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<sup>6</sup>(...continued)

yet been entered. The final decree of Divorce was entered on November 7. Husband filed his Notice of Appeal and the appeal bond on December 1.

<sup>7</sup> See also *Rodakis v. Byrd*, 1992 WL 301312, holding that "[a] judgment ordering periodic payment of child support, if it otherwise meets the criteria set out in Rule 54.02, Tennessee Rules of Civil Procedure, is a final judgment as that term is generally used. However, unlike most 'final' judgments, the court does not lose jurisdiction to modify the judgment at a later date based upon a material change in circumstances."